89-1758

NO.

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

GARY L. PENNY,

Petitioner,

VS

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS, TEXAS

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QUESTION PRESENTED

Whether an inventory search should be sustained as an exception to the Fourth and Fourteenth Amendments, where the only limitation upon the discretion of the police is a directive that "[o]fficer inventories vehicle?"

LIST OF PARTIES

The parties to the proceedings below were:

Appellant:
Gary L. Penny

Appellee:
The State of Texas

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The Petitioner, Gary L. Penny, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Judicial Supreme District of Texas at Dallas, Texas, entered July 2, 1985. (Appendix C.)

OPINIONS BELOW

In chronological order, the intermediate Court of Appeals in Dallas, Texas, considered, *inter alia,* the federal question here presented on appeal from the District Court in Dallas, Texas, and rendered its opinion adverse to Petitioner on July 2, 1985. (Appendix C.) Following that decision, Petitioner pursued the issue in his Petition for Discretionary Review to the Court of Criminal Appeals of Texas, said Court dismissing the petition, after initially granting review, by its opinion dated December 14, 1988. (Appendix B.) Thereafter, on Petitioner's Motion for Rehearing, the Court of Criminal Appeals of Texas again granted review but again dismissed the petition by a five-to-four decision delivered February 14, 1990. (Appendix A.) All of the above

opinions were ordered not to be published. Since the highest state court, the Court of Criminal Appeals of Texas, in both of its opinions (Appendices A and B), refused to review Petitioner's case without ruling on the merits, the reviewable judgment would be that of the intermediate appeals court. (Appendix C.) *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 1676, 678 n.1 (1968). The Texas Court of Criminal Appeals did, however, stay its mandate until May 15, 1990, pending the filing of this Petition.

JURISDICTION

On February 14, 1990, the Texas Court of Criminal Appeals finally dismissed Petitioner's Motion for Rehearing, which effectively denied Petitioner's Fourth and Fourteenth Amendment claim in the appeals court below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). No other petitioner is involved in this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

This was a prosecution for attempted murder. Petitioner was stopped for driving his vehicle at an excessive rate of speed. Petitioner was placed under custodial arrest after the officer ascertained that there was an outstanding warrant on Petitioner for the charged offense of attempted murder.

Since neither of the Petitioner's passengers was carrying a valid driver's license, the officer impounded the vehicle and, during an alleged inventory search, discovered a handgun (subsequently connected with the shooting) in the locked trunk of Petitioner's automobile. (Appendix D, pp. D-4-5.)

At the hearing on Petitioner's motion to suppress, in an attempt to prove the validity of the inventory search, the prosecutor introduced the written policy regarding such inventory searches as State's Exhibit 16. (Appendix E.) The arresting officer identified the written policy and stated that it was in effect at the time of the impoundment and search of the vehicle in question. (Appendix D, p. D-4.)

As can be seen from a review of Exhibit 16, other than the mere use of the word "inventories," the policy is devoid of any direction as to the scope of the inventory. The total operative words of the inventory policy are:

> Officer inventories vehicle, completes inventory list of property and attaches to original impound card.

(Appendix E, p. E-2.)

The motion to suppress should have been granted by the trial court. The gun produced through such search was critical evidence that connected the Petitioner to the offense charged.

REASONS FOR GRANTING THE WRIT

We necessarily first focus on whether the handgun seized from the locked trunk of Petitioner's vehicle pursuant to an alleged inventory was the product of an impermissible discretionary search by the police. The basis for the inventory exception to the Fourth Amendment is that law enforcement is not vested with discretion to determine the scope of the inventory search. *Colorado v. Bertine*, 479 U.S. 367 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 382-383 (1976) (Powell, J., concurring).

> Inventory searches, however, are not conducted in order to discover evidence of a crime. *The officer does not make a discretionary determination to search* based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with *established police department rules or policy* and occur whenever an automobile is seized. There are thus no special facts for a neutral magistrate to evaluate.
>
> A related purpose of the warrant requirement is to prevent hindsight from affecting the evaluation of the reasonableness of a search. [Citations omitted.] In the case of an inventory search *conducted in accordance with standard policy department procedures, there is no significant danger of hindsight justification.* The absence of a warrant will not impair the effectiveness of a particular inventory search. [Emphasis added.]

Opperman, 428 U.S. at 383.

In this cause, there simply was no standardized procedure relating to whether an officer is mandated to inspect the locked trunk of an impounded vehicle. In fact the policy, if one would call it that, contains no directive at all as to the scope of the search. (See, Appendix D, p. D-4; Appendix E, p. E-2.) This is left solely to the discretion of the police — the precise discretion condemned in *Bertine* and *Opperman*. The Texas appeals courts simply ignored the mandate of this Court.

This mandate appears unaltered by this Court's recent opinion in *Florida v. Wells*, No. 88-1835, ___ U.S. ___, 58 U.S.L.W. 4454 (April 18, 1990), despite the dicta found in the majority opinion. In *Wells* it appears that no policy relating to inventory searches existed at the time of the search, contrary to the representations by the State of Florida, *Wells*, 58 U.S.L.W. at 4455 (Brennan and Marshall, JJ.,

concurring). In this cause, however, there was a written policy, which was admitted into evidence in the form of an exhibit and confirmed by the testimony of the officer making the search as the policy that existed.

The only standard reflected by this written policy though is "[o]fficer inventories vehicle." (Appendix E.) What does this mean? Does it mean, as perhaps indicated in the dicta of *Wells*, that this affords the "latitude" of determining what should or should not be done "in light of the nature of the search and characteristics of the container itself?" *Wells*, 58 U.S.L.W. at 4454. If so, this would be contrary to the principles of *Bertine* and *Opperman*. For as reiterated in the concurring opinions in *Wells*, the guiding principle remains that an inventory search is reasonable under the Fourth Amendment only if it is done in accordance with standard procedures that *limit* the discretion of the police. Furthermore, one cannot read the reference in the majority opinion in *Wells* to *some* discretion afforded police officers to mean *total* discretion stemming from the mere use of the word "inventories."

In this, Petitioner does not urge the Court to grant certiorari for mere correction of error (although this Court is empowered to do so under 28 U.S.C. § 2106). A remand of this case to the Court below for reconsideration of Petitioner's claim in light of *Wells* would be entirely appropriate given the factual and legal similarities in the cases. However, in the wake of *Wells* this Court's grant of certiorari in this cause can also serve to resolve a split of opinion between the highest courts of two states as well as give clearer guidance to the courts below.

CONCLUSION

The question here presented is a highly significant issue in the development of the constitutional parameters of the inventory exception to the Fourth and Fourteenth Amendments to the Constitution of the United States. This Court should grant review to resolve the split of opinion in the highest courts of two states and to fully delineate and develop the law pertaining to the inventory exception.

Respectfully submitted,

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Date: May 11, 1990

APPENDIX A

No. 974-85

Gary Lynn Penny, *Appellant*
v.
The State of Texas, *Appellee*

PETITION FOR DISCRETIONARY REVIEW FROM THE FIFTH COURT OF APPEALS [DALLAS COUNTY]

OPINION ON APPELLANT'S MOTION FOR REHEARING

Appellant was convicted by a jury of attempted murder and was sentenced to ten years and one day imprisonment and assessed a ten thousand dollar fine. Appellant's conviction was affirmed in an unpublished opinion. *Penny v. State,* No. 05-83-00375-CR (Tex. App. — Dallas, delivered July 2, 1985). We granted appellant's petition for discretionary review to determine whether the Court of Appeals erroneously held 1) that appellant could be found guilty without the specific intent to kill, and 2) it was harmless error for the prosecutor to argue in close that appellant could be found guilty without the specific intent to kill.

After review of the record, we held that our decision to grant review was improvident. *Penny v. State,* No. 974-85 (Tex.Cr.App. delivered December 14, 1988). Appellant urged on motion for rehearing that we re-examine our opinion on original submission, and we agreed to do so. After a thorough review of the briefs, the record and the Court of Appeals' opinion, we have again determined that appellant's petition for discretionary review and motion for rehearing were improvidently granted.

Appellant's motion for rehearing is therefore ordered dismissed.

PER CURIAM

Clinton, Teague, Miller and Duncan, JJ., dissent.
(Delivered February 14, 1990)
Do Not Publish

APPENDIX B

No. 974-85

Gary Lynn Penny, *Appellant*

v.

The State of Texas, *Appellee*

PETITION FOR DISCRETIONARY REVIEW FROM THE FIFTH COURT OF APPEALS [DALLAS COUNTY]

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

On March 10, 1983, appellant was convicted of attempted murder. Punishment was assessed at ten years and one day as well as a fine of ten thousand dollars.

On appeal, appellant's conviction was affirmed by the Dallas Court of Appeals. In an unpublished opinion, that court found that the jury argument complained of did not constitute harmful error. *Penny v. State*, No. 05-83-00378-CR (Tex.App.-Dallas, July 2, 1985).

We granted appellant's petition for discretionary review to examine the holding of the Court of Appeals. After careful review of the briefs of the respective parties and the opinion of the Court of Appeals, we have determined that the appellant's petition for discretionary review was improvidently granted.

Appellant's petition for discretionary review is therefore ordered dismissed.

PER CURIAM

(Delivered December 14, 1988)
Do Not Publish
Clinton and Miller, JJ. dissent.

APPENDIX C

No. 05-83-00378-CR

Gary Lynn Penny, *Appellant*
v.
The State of Texas, *Appellee*

COURT OF APPEALS FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS FROM A DISTRICT COURT OF DALLAS COUNTY, TEXAS

BEFORE JUSTICES SPARLING, VANCE AND MALONEY, OPINION BY JUSTICE VANCE JULY 2, 1985

Appellant was convicted of attempted murder, sentenced to ten years and one day imprisonment, and assessed a $10,000 fine. Appellant contends that the trial court erred by (1) overruling his objection to the prosecutor's misstatement during final argument of the law contained in the court's jury charge; (2) overruling his objection to the prosecutor's reference in final argument to machine guns; and (3) admitting into evidence a handgun seized during an inventory search of appellant's car. We disagree and affirm.

Jury Argument — Misstatement of Law

The evidence reveals that appellant and the complainant once were romantically involved but that they were estranged at the time of the offense and quarrelling over the division of certain property, including two German shepherd dogs. On or about November 27, 1982, appellant, screaming that he was coming to get his dogs, fired three shots into the front of the complainant's home. The complainant, a friend, and one of her daughters were in the living room located adjacent to the front door foyer. The complainant saw a gun pointing through broken glass at the front door, and, although no one was injured, bullets struck the floor near the complainant.

To convict appellant of attempted murder, the State must prove that (1) appellant, (2) with specific intent to commit the offense of murder, (3) attempted to cause the death of the victim (4) by knowingly or intentionally shooting at the victim (5) with a handgun, (6) said act amounting to more than mere preparation that tended but failed to effect the commission of the offense. *See Flanagan v. State*, 675 S.W.2d 734, 736 (Tex. Crim. App. 1984) (On State's Motion for Rehearing and on Court's Own Motion for Rehearing). The most strenuously contested issue at trial was whether appellant acted with the specific intent to kill the complainant. In final argument, defense counsel contended that the State did not prove specific intent beyond a reasonable doubt, and the State responded to the argument:

> [PROSECUTOR]: Now, under the law it says, and you can read this, that the person commits the offense of murder, we are talking about attempted murder, when they either have a conscious desire to take their life or they are reasonably certain from engaging in their conduct that a life can be taken. That's under the definition of knowingly.
>
> You see what the law says is very simply under the facts of this case that if Gary Penney realized those people and this victim was [sic] in that house and took that gun and shot in there and by shooting in that house he was reasonably certain that she could be killed then he would be guilty of attempted murder. That's the law. And to say he had to have the specific intent to take her life is wrong.
>
> [DEFENSE COUNSEL]: I object to that as a misstatement of the law. Obviously an element in the charge.
>
> THE COURT: Overrule the objection.
>
> [PROSECUTOR]: The intent to commit the offense of murder which is to be reasonably certain that your conduct is capable of causing the result. Take a look at it. Look at it. It's under the definition of knowingly. That's what we are talking about pure and simple.

Taken in context, the prosecutor appears to be explaining to the jury the *mens rea* accompanying the *actus reus* of murder by distinguishing "intentional" from "knowing." The prosecutor told the jury that finding "intent," — a conscious objective or desire to engage in the conduct or cause the result — is not essential to conviction. Appellant can be found guilty if he acted knowingly, i.e., with awareness that his conduct was reasonably certain to cause the result.

Even if we agree with appellant that the prosecutor's statements could be interpreted to mean, contrary to the court's charge, that the State was not obligated to prove specific intent to kill, we conclude that the error was harmless. An argument containing statements of law contrary to the court's charge is error. *See Burke v. State,* 652 S.W.2d 788, 790 (Tex. Crim. App. 1983) (en banc); *Cook v. State,* 540 S.W.2d 708, 710 (Tex. Crim. App. 1976); *Lincoln v. State,* 508 S.W.2d 635, 638 (Tex. Crim. App. 1974). The test to determine if error in prosecutorial argument is harmless is whether a reasonable possibility existed that the argument might have contributed to conviction. *Saylor v. State,* 660 S.W.2d 822, 825 (Tex. Crim. App. 1983) (en banc). Error is not reversible unless, in light of the record as a whole, the statements were manifestly improper, violative of a mandatory statute, or injected new facts harmful to the accused. *Brooks v. State,* 642 S.W.2d 791, 798 (Tex. Crim. App. 1982).

The abstract portion of the charge correctly defined attempted murder and "intentionally" and "knowingly," and the application paragraph required the jury to find that appellant acted with the specific intent to commit the offense of murder. Further, shortly prior to the objectionable remarks, the prosecutor stated to the jury that "if you don't believe he had the specific intent to kill he's not guilty."

Further, the prosecutor's statements were part of an argument that intent or knowledge can be inferred from conduct:

> The reason he did it is because he saw her, he was mad and he was going to shoot her. You ask yourself this: They can sit her [sic] and argue and attack the only thing that you can't touch and you

> can't feel in this case and that's the subjective state of mind of the person that committed the offense. And what we have to do as reasonable people is look, as the law says, and quite properly so, what he did and what he said.
>
> And I'll submit to you that he took that gun and he saw here and he shot at her. And the question is at that point in time was he reasonably certain that his conduct could cause her death.
>
> The answer to that, shooting into a house at that distance with that bullet aiming in the direction where she's sitting and the answer to that is yes. That's why he's guilty.

Thus, the gist of the prosecutor's argument was that conduct is probative evidence of mental state and that a finding that appellant *knowingly* shot the victim is probative of appellant's specific intent to kill.

Appellant relies on *Dues v. State*, 634 S.W.2d 304, 306 (Tex. Crim. App. 1982), in which the prosecutor told the venire that the intent element of the offense of terroristic threat referred to the victim's, not the defendant's, state of mind. *Dues* is distinguishable. The assertion was a blatant misstatement of the law, and the jury instructions compounded the error. Accordingly, we hold that any error was harmless. *See Johnson v. State*, 604 S.W.2d 128, 135 (Tex. Crim. App. 1980).

Jury Argument — Machine Guns

Appellant objected to the following jury argument:

> [PROSECUTOR]: This threat was not recorded, if you remember. He said to her on that phone, which was not recorded, this conversation he says Sue, I'm coming over there, I'm coming over there and I'm going to make — I'm going to find out what you're made of, what your neighbors are made of and I'm going to bring — I'm going to take on the whole DPD, the whole Dallas Police Department.

> And I'll bring over my AR 15 and my MAC 10. Folks, I don't know but I know for a fact from the evidence that says that's a machine gun.

Appellant contends the argument is outside the record. We disagree. The evidence reveals two references to machine guns. The complainant testified that appellant threatened to come to her house with his "AR 15 and his MAC 10. He could take on the Dallas Police Department." She described an AR 15 as "some kind of high-powered rifle." In response to the prosecutor's question whether it was a machine gun, she replied, "It's a semi-automatic weapon." Additionally, a neighbor testified that appellant "had aimed threats at [the complainant's] family, her children, the neighbors, police force, et cetera, and with the machine gun." Accordingly, we hold that the jury argument was supported by the record and, consequently, not error.

Inventory

Tim Overbey of the Allen Police Department testified that on December 2, 1982, he stopped appellant for driving his automobile at an excessive rate of speed and arrested appellant after ascertaining the existence of an outstanding warrant for the instant offense. Since neither of appellant's passengers was carrying a valid driver's license, Overbey impounded the vehicle and, during an inventory search, discovered a Smith & Wesson magnum handgun in the trunk of appellant's car.

A routine inventory search of a lawfully impounded automobile is constitutional. *South Dakota v. Opperman,* 428 U.S. 364, 365, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); *Martinez v. State,* 644 S.W.2d 104, 110 (Tex. App. — San Antonio 1982, no pet.). The search is not predicated on probable cause, *Backer v. State,* 656 S.W.2d 463, 464 (Tex. Crim. App. 1983) (en banc); *Evers v. State,* 576 S.W.2d 46, 50 (Tex. Crim. App. 1978), but is reasonable under U.S. CONST. amends. IV, XIV if conducted pursuant to a standard police policy designed to guard against unfettered discretion and arbitrariness. *Opperman,* 428 U.S. at 366; *Cady v. Dombrowski,* 413 U.S. 433, 437, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); *Kelley v. State,* 677 S.W.2d 34, 37 (Tex. Crim. App.

1984) (en banc); *Curren v. State*, 656 S.W.2d 124, 129 (Tex. App. — San Antonio 1983, no pet.). The State has the burden of proving the propriety of an inventory search. *Stephen v. State*, 677 S.W.2d 42, 43 (Tex. Crim. App. 1984) (en banc); *Ward v. State*, 659 S.W.2d 643, 646 (Tex. Crim. App. 1983) (en banc); *Benavides v. State*, 600 S.W.2d 809, 812 (Tex. Crim. App. 1980).

Appellant does not challenge the impoundment but contends, initially, that the State failed to validate the inventory search by proving the existence and use of standard procedures. The State introduced the Allen Police Department's written policy regarding inventory searches:

> Officer requesting impoundment completes impound card and one copy and gives the copy to the wrecker driver.
>
> Officer inventories vehicle, completes inventory list of property and attaches to original impound card.
>
> Officer attached 10-28 return to original impound card and turns it into dispatcher.

Officer Overbey testified that the inventory was conducted pursuant to a standard procedure to protect police from allegations of theft following impoundment.

We hold that the State satisfied its burden of proof by introducing the testimony of an officer that an inventory policy existed and was followed; the written policy need not be introduced in evidence. *Stephen*, 677 S.W.2d at 44; *Evers*, 576 S.W.2d at 50 n.5. "If appellant wished to appeal the policy or alleged deviation from that policy, then appellant must develop the record." *Evers*, 576 S.W.2d at 50 n.5. *See also Kelley*, 677 S.W.2d at 37; *Curren*, 656 S.W.2d at 129. Accordingly, we hold that the State sustained its burden of proving the legality of the inventory search.

Secondly, appellant contends that Officer Overbey exceeded the permissible scope of the search by using appellant's keys to open the locked trunk. We disagree. Although a forcible entry of a locked trunk is unlawful, *Gill v. State*, 625 S.W.2d 307, 320 (Tex. Crim. App. 1980) (en banc) (On State's Motion for Rehearing), an officer may use keys to

peaceably open the trunk and inventory its contents. *Stephen*, 677 S.W.2d at 44; *Kelley*, 677 S.W.2d at 37; *Martinez*, 644 S.W.2d at 110. Opening the trunk is consistent with the purposes underlying the need for and validity of an inventory search: (1) to protect the owner's property while it is in police custody; (2) to protect the police against claims or disputes over lost or stolen property; and (3) to protect the police from potential dangers. *Opperman*, 428 U.S. at 369; *United States v. Hall*, 565 F.2d 917, 921 n.7 (5th Cir. 1978); *Kelley*, 677 S.W.2d at 37; *Martinez*, 644 S.W.2d at 109. We conclude that the search of the trunk did not exceed the permissible scope of an inventory search; accordingly, we overrule all grounds of error and affirm.

[s] John C. Vance

JOHN C. VANCE
JUSTICE

DO NOT PUBLISH
TEX. R. CRIM. APP. P. 207.

APPENDIX D

(Witness sworn by the Court)

TIM OVERBEY

called as a witness by the State, being duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GILLETT:

Q. State your name for the record, please?

A. Tim Overbey.

Q. Mr. Overbey, how are you employed?

A. Police officer with the City of Allen.

Q. How long have you been so employed?

A. 2 and a half years.

Q. Were you working and on duty on December 2nd, 1982?

A. Yes, sir, I was.

Q. Were you working in the city limits of Allen, Texas?

A. Yes, sir.

Q. Your duties and responsibility is the enforcement of all laws?

A. That is true.

Q. On that date December 2, 1982 at approximately 1:28 p.m. did you have occasion to come in contact with an individual by the name of Gary Lyn Penney?

A. Yes.

Q. Is that the gentlemen seated at the far end of the defense table in the brown suit?

A. Yes, sir.

Q. Did you have occasion to clock a vehicle that he was driving and operating there on northbound Highway 75 at McDermitt?

A. Yes, sir.

Q. What's the posted speed limit?

A. 55.

Q. What did you clock?

A. Between 64 and 66 miles an hour.

Q. Was he exceeding the speed limit by a minimum of 9 to 11 miles per hour?

A. Yes, he was.

Q. Was that offense committed in your presence, you saw it?

A. Yes.

Q. Subsequent to observing this did you have occasion to stop the particular vehicle he was driving and operating?

A. Yes, I did.

Q. Was that an '83 Cadillac or — excuse me, an '82 Cadillac?

A. No, it was an '82, had '82 registration on it.

Q. Did you have occasion to — did Mr. Penney step from the car?

A. Yes, sir, I asked him to.

Q. Did you attain a valid driver's license from Mr. Penney?

A. Yes, sir.

Q. Did you then return to your squad car?

A. Yes.

Q. Did you run any type of a check to ascertain whether or not there were any outstanding warrants for the Defendant's arrest?

A. Yes, sir.

Q. And did you do this through your police department?

A. Yes, I did.

Q. Were you advised by an agent of the Allen Police Department that there was at that time an outstanding warrant for a Mr. Penney in connection with an alleged aggravated assault offense, felony offense occurring in Dallas on November 26, 1982?

A. Yes, sir.

Q. Let me ask you if you relied upon that information in good faith and believed that to be the case?

A. Yes, sir, I did.

Q. Although you haven't seen this let me ask you to look at State's Exhibit 17. Directing your attention to this warrant number up here and ask you if that is the warrant that you received information about?

A. Yes, sir, I believe it is.

Q. Subsequent to that did you have occasion to arrest Mr. Penney?

A. Yes, sir, I did.

Q. In connection with that?

A. Yes, sir.

Q. He was also stopped for speeding, is that correct?

A. Yes.

Q. That's an offense you couldn't take him to jail for, he would have to fill out and post a bond?

A. That's correct.

Q. Did you as you arrested him and took him, did you arrest him and take him to jail?

A. I did arrest him and did impound his vehicle.

Q. My question was: Did you take Mr. Penney and was he transported to the Allen jail?

A. Yes.

Q. With his vehicle out there did you impound the vehicle?

A. Yes, sir, I did.

Q. Did you call a wrecker service to tow it to the pound?

A. Yes, sir.

Q. Now in connection with the arrest of the suspect, and having his vehicle and impounding it for the protection of the police officers, did you conduct an inventory search of that vehicle to protect the police from an allegation of potential theft by the Defendant or by the people that were driving and operating the motor vehicle while towing it, i.e. the wrecker service people?

A. Yes, sir.

Q. Do you have a written policy in connection with that in the Allen Police Department calling for inventory search?

A. Yes.

Q. Let me show you State's Exhibit 16 and ask you to identify that.

A. This is a copy of our policy.

Q. Did you bring that to Court at my request?

A. Yes.

Q. Was that policy in force and in effect in writing prior to this arrest and impounding of that vehicle?

A. Yes, sir, it was.

MR. GILLETT: Offer 16 for record purposes
MR. NELSON: No objection.
THE COURT: Admitted.

BY MR. GILLETT:

Q. Prior to the vehicle being towed off by the wrecker at the scene did you have occasion to conduct an inventory search of it?

A. Yes.

Q. Did you likewise conduct a search of the trunk of the vehicle?

A. Yes, I did.

Q. For inventory purposes, as you testified, to protect the police department and the wrecker service?

A. Yes, sir.

Q. Let me show you what I've had marked as State's Exhibit No. 15 and 16 and ask you to examine those documents and tell Judge Gossett whether or not you are able to identify them?

A. Yes, sir, they have my mark on the butt of the gun.

Q. Let me put 14 back on it. It's a scabberd. Rephrase the question as to State's Exhibit 14 and 15. Do you recognize 14?

A. Yes.

Q. Is it a .357 handgun?

A. Yes, sir, it is.

Q. You're able to identify it in what way?

A. My mark is on the butt of the gun, my initials.

Q. States —

A. My initials T O.

Q. You placed those on the gun?

A. Yes.

Q. Was it in the holster?

A. Yes, sir.

Q. State's Exhibit 15 appears to be inventory package that contains at this time 6 rounds, 1 of which has been fired and used for testing. At the time you recovered the gun from the trunk of the Defendant's automobile was it loaded?

A. Yes, it was.

Q. Are those the rounds that were contained within the gun, the one — all of them being live rounds, the one being fired that had been used in the testing of that particular weapon, is that correct?

A. Yes, sir.

Q. Now, if there had — if you had been advised there was an outstanding warrant that had been posted for the Defendant and had been posted at that time he would not have been arrested on the felony offense, outstanding warrant, is that correct?

A. If the bond had been posted?

Q. Yes. Your knowledge and belief it was a good outstanding warrant which is State's Exhibit 17, is that correct?

A. Yes, sir.

MR. GILLETT: Okay. Pass the witness. Let me at this time offer 14 and 15 for record purposes.

MR. NELSON: That's fine. No objection.

THE COURT: They will be admitted.

CROSS-EXAMINATION

BY MR. NELSON:

Q. Officer Overbey you stopped Mr. Penney for speeding, is that correct?

A. Yes, sir.

Q. That is not an offense which he could be taken to jail, provided he signed the ticket?

A. That's right.

Q. Did you write him a ticket for speeding?

A. Not at that time.

Q. Did you do one later?

A. No, I did not.

Q. There was another person in Mr. Penney's vehicle?

A. There were 2 other persons.

Q. Were any of the people drunk or intoxicated?

A. No, sir.

Q. Did you ask for their driver's license?

A. Back-up units.

Q. Did they have driver's licenses?

A. No, sir.

Q. Neither one of them had driver's license?

A. No, sir.

Q. How old were these people?

A. I really don't know, sir. My back-up officers when the warrant was confirmed and I asked for a back-up officer to back me up they did check the 2 people that were with him. I didn't have anything to do with them.

Q. Do you know if they had driver's licenses or not?

A. I was told they did not.

Q. Where was the car parked?

A. The vehicle was on the shoulder of northbound U.S. 75 just north of McDermitt Road.

Q. Was it illegally parked?

A. No.

Q. Was it obstructing traffic in any way?

A. No, sir.

Q. Officer, when you arrested Mr. Penney for aggravated assault that was the offense you arrested him for?

A. That's correct.

Q. You didn't know anything about the facts of the case itself?

A. No.

Q. You didn't know what weapons if any were involved?

A. No.

Q. You had no idea that there might be a pistol in that car did you?

A. Well, when it came back that he had been involved in an assault I thought there might be a weapon.

Q. You thought. Was there any fact you could point to to lead you to believe there was any type of weapon in that car?

A. No, sir.

Q. You did not impound the vehicle for the purpose of searching for a gun, did you?

A. No, the vehicle was impounded by the — our policy. There was no driver to turn it over to.

Q. The sole reason for your impoundment of that vehicle was to follow the police department policy for impoundment of vehicles when there is nobody there to release it to?

A. That's correct.

Q. That is a policy instituted by your police department and followed whether there is probable cause to search a car or not, is that correct?

A. When we impound the vehicle we do an inventory search on the vehicle.

Q. I understand that. Even if you don't have any reason to believe there is anything in that car you impound it and search it, is that correct?

A. Yes.

Q. That is the situation in this case?

A. Yes, sir.

Q. The sole reason for impounding the vehicle was because of departmental policy, is that correct?

A. Yes, sir.

Q. Now as I understand it the controlling reason for the policy of impounding a vehicle is for safekeeping?

A. And for the protection of the officers, yes, sir.

Q. What do you mean by protection of the officers, protection for civil suit from having something stolen out of the car?

A. Yes, sir.

Q. Basically it's keeping for — someone who is arrested keeping their possessions safe?

A. Yes, sir.

THE COURT: Counsel, let's hurry along. Taking a lot of time here.

MR. NELSON: I understand, Your Honor there are certain things I feel need to be on the record to preserve it. I apologize for taking up the Court's time.

BY MR. NELSON:

Q. Officer, one more thing. If you had decided for whatever reason that you wanted to get a search warrant before entering the trunk would you have had time to do so, there at the station, once the car was impounded?

A. In what timeframe are you talking about?

Q. Once ya'll have the car. All right? It's not going to be released until ya'll are ready to release it?

A. If we put a hold on it.

Q. All you have to do is tell them to put a hold on it, correct?

A. Yes, sir.

Q. So you would then have time to procure a search warrant in a situation where you want to go get one?

A. It would probably take me about 3 hours to get a search warrant.

Q. You could do it?

A. Possibly, yes, sir.

Q. If you put a hold on the car it would stay there until you got your warrant?

A. Yes, sir.

Q. Had there been any reason in your mind to think there was anything in that car to cause a search and if there hadn't been the inventory you could have gotten the search warrant if you wanted to, right?

A. Like I say, it would have taken awhile but yes, sir, I could have.

MR. NELSON: Pass the witness.

RE-DIRECT EXAMINATION

BY MR. GILLETT:

Q. The area out there on 75, that's a major thoroughfare?

A. Yes, sir.

Q. Of course if you leave a vehicle out there it's subject to being taken by vandals?

A. Damaged by other vehicles or anything such as that.

Q. Somebody — while you're not there watching somebody could hook up and pull it off illegally?

A. Yes, sir.

MR. GILLETT: That's all.

MR. NELSON: That's all I have.

MR. GILLETT: We rest on the hearing.

THE COURT: Defense have any further testimony?

MR. NELSON: We have no further witnesses to call. We have argument to present.

APPENDIX E

6.17 IMPOUNDING VEHICLES

Effective Date: 12/2/82

The administration desires that vehicles be impounded only when necessary to:

- comply with applicable legal requirements
- reduce possibility of personal injury, property damage or theft
- expedite the flow of traffic
- facilitate the release of vehicle to owner
- contribute to accomplishment of department goals

In all cases, impoundment should be accomplished in accordance with legal requirements.

AFFECTS:

PROCEDURES

6.17.001 WHEN TO IMPOUND

Officers impound vehicles when:

- the driver is arrested and the vehicle cannot be released to an acceptable licensed person
- proper notification has been made, the vehicle has been tagged and the 48 hour time period has expired
- the vehicle has been involved in an accident, is interfering with traffic flow or constitutes a traffic hazard and cannot be moved by another acceptable means

6.17.002 IMPOUNDMENT PROCEDURES

Officer requesting impoundment completes impound card and one copy and gives the copy to the wrecker driver.

Officer inventories vehicle, completes inventory list of property and attaches to original impound card.

Officer attached 10-28 return to original impound card and turns it into dispatcher.

Officer places hold on vehicle if there is a legal question of ownership or extenuating circumstances, eg., seizure by Federal agency, et cetera.

(2)

NO. 89-1758

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

GARY L. PENNY,

Petitioner,

V.

THE STATE OF TEXAS

Respondent.

On Petition For Writ of Certiorari
To the Fifth Court of Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the post-arrest impoundment and inventory of Penny's car pursuant to the written policy of the Allen Police Department violated Penny's fourth amendment rights.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Supreme Judicial District of Texas affirming Penny's conviction is attached to the Petition for Writ of Certiorari as Appendix C.

[1]For clarity, Respondent is referred to as "the state," and Petitioner as "Penny."

JURISDICTION

The Texas Court of Criminal Appeals intially granted Penny's petition for discretionary review, but dismissed it as improvidently granted on December 14, 1988. On February 14, 1990, that court denied Penny's motion for rehearing. Penny timely filed the petition for writ of certiorari on May 11, 1990. He properly seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Penny bases his claim upon the fourth and fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

On December 2, 1982, at 1:28 p.m., Officer Tim Overby of the Allen Police Department stopped Penny for speeding (SF 101-02). A routine warrant check revealed that there was an outstanding arrest warrant for Penny for the felony offense of aggravated assault (SF 103). Penny was arrested, and his car was impounded pursuant to the written policy of the Allen Police Department (SF 105-06, 111). This same policy required Overby, after impounding the car, to conduct an inventory of its contents. While conducting this inventory, Overby found a loaded .357 handgun lying in the truck of Penny's car (SF 105-07).

Penny was subsequently charged and tried for attempted murder in the 292nd Judicial District Court of Dallas County, Texas, Cause No. F-83-97148. The gun found in his trunk was evidence of that crime. At trial, Penny moved to suppress the evidence seized during the inventory. The motion was denied, and he was ultimately convicted.

On direct appeal, Penny's conviction was affirmed by the Court of Appeals for the Fifth Supreme Judicial

District of Texas on July 2, 1985. *Penny v. State,* No. 05-83-378-CR (Tex. App.—Dallas 1985). Penny's petition for discretionary review was granted by the Texas Court of Criminal Appeals, but was subsequently dismissed as improvidently granted on December 14, 1988. *Penny v. State* No. 974-85, (Tex. Crim. App. 1988). Penny's motion for rehearing was dismissed on February 14, 1990.

SUMMARY OF ARGUMENT

Penny advances no special or important reason for the Court to invoke its certiorari jurisdiction in this case. He challenges the inventory search of his vehicle as being in violation of his fouth amendment rights. To the contrary, the court below properly applied the relevant constitutional standard to the facts of Penny's case. His car was impounded and inventoried pursuant to the written policy of the Allen Police Department. Both the dicatates of this policy and the conduct of the officer in question served to promote the valid purposes served by an inventory search, and at the same time served to insure that the inventory was not simply a ruse to search for evidence of a crime. Therefore, the inventory was proper, Penny's fourth amendment rights were not violated and the court below was correct in holding that Penny was not entitled to relief on his claim.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor.

Penny has advanced no special or important reason in this case, and none exists. This case presents only the question whether well-settled constitutional principles were applied correctly to the facts of this case. Thus, no important question of law is presented.

II.

THE COURT OF APPEALS PROPERLY APPLIED THE CORRECT CONSTITUTIONAL STANDARD TO ASSESS WHETHER THE SEARCH OF PENNY'S CAR WAS JUSTIFIABLE AS AN INVENTORY SEARCH.

Penny argues that this Court should determine that his case is worthy of review because the Allen Police Department's policy on conducting inventory searches is constitutionally inadequate. To the contrary, as found by the Texas Court of Appeals, an application of well-established constitutional principles to the facts of Penny's case makes it clear that the inventory policy of the Allen Police Department is sufficient to pass constitutional muster. Because the Court of Appeals properly applied the relevant law to the facts developed in the trial court, Penny's case does not merit review.

The seminal case in the area of inventory searches of automobiles is *South Dakota v. Opperman,* 428 U.S. 364 (1976). Therein, the Court upheld the constitutionality of a standard inventory search. In doing so, the Court noted that automobiles are frequently taken into police custody, and that the authority of police to seize vehicles and remove them from the streets is beyond challenge. *Id.* at 369. The Court continued by observing:

> When vehicles are impounded, local police departments generally follow a routine prac-

> tice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody...; the protection of the police against claims or disputes over lost or stolen property...; and the protection of the police from potential danger.

Id. The Court further noted that when police take custody of an automobile it is reasonable to search it in order to itemize the property to be held by the police. *Id.* at 371, *citing United States v. Gravitt*, 484 F.2d 375, 378 (5th Cir. 1973) (upholding as valid an inventory search which resulted in finding contraband in trunk of seized vehicle).

At issue in *Opperman* was whether it is allowable to search the glove compartment during an inventory search of an automobile. The Court held that it is because a glove compartment is a customary place for the temporary storage of valuables. In upholding the validity of the search, the Court stressed that the inventory was conducted according to an established policy. Subsequent cases have deemed this a necessary aspect to a valid inventory search. In *Florida v. Wells,* the Court reasoned that standardized criteria or established routine is necessary because

> an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime.

Florida v. Wells, __U.S.__, __, 110 S.Ct. 1632, 1635 (1990).

Thus, the reason a policy is required is to prevent officers from using inventory searches as a excuse to conduct a criminal investigation. In the present case, the impoundment and inventory policies of the Allen Police Department are sufficient to prevent an inventory of the car solely for the purpose of obtaining evidence of a crime. For instance, the policy specifically informs officers that "the administration desires that vehicles be impounded only when necessary" (Petitioner's Appendix E). The policy continues to make clear that there are only a few situations that justify the impoundment of a vehicle. For instance, a vehicle may be impounded, as in the present case, when "the driver is arrested and the vehicle cannot be released to an acceptable licensed person." *Id.* Then, it is permissible to impound the vehicle when it is "necessary to reduce the possibility of personal injury, property damage or theft." *Id.*

In the present case, the officer testified that he was following the above policy in impounding the vehicle (SF 105). He testified that he impounded the vehicle because, when Penny was arrested, there was no licensed driver to whom the car could be released (SF 109). Moreover, he testified that the car was impounded to protect against damage to or theft of personal property and to protect against claims against the officer or the department (SF 111). On the facts of this case, both the dictates of the policy and the conduct of the officer insured that this search was not conducted in order to obtain evidence of a crime.

Penny argues that, even if the decision to inventory his car was proper, the scope of the inventory was not sufficiently regulated. It is true that the policy introduced into evidence in this case does not specify the scope of the inventory. However, the scope of the inventory in the present case was clearly reasonable. In *South Dakota v. Opperman*, the Court upheld the search of a glove compartment,

noting that courts in general recognize that standard inventories include the glove compartment, because "it is a customary place for documents of ownership and registration,...as well as a place for the temporary storage of valuables." *Id.* 428 U.S. at 372.

Under the reasoning of *Opperman,* then, the permissible scope of a standard inventory must also include the trunk, as that is also a common place for the storage of valuables. As stated by the Fifth Circuit in discussing the permissible scope of a standard inventory search:

> Our reading of *Opperman*, however, has led us to conclude that an inventory search may not be unlimited in scope. Once again, we are guided by the standard of reasonableness. Only so long as the scope of the search is reasonable, taking into consideration the three interests to be protected by the inventory, will it be held to be a constitutionally permissible intrusion. The complete dismantling of an automobile, or parts thereof, for example, would not withstand constitutional scrutiny because such action would not reasonably serve to promote or further the interests which justify an inventory search...
>
> * * *
>
> The starting point of our analysis is that the police, in conducting an inventory search, may ordinarily inspect the glove compartment, the trunk, on top of the seats as well as under the front seats, and the floor of the automobile. An inspection of these areas is reasonable because these are common locations in or on which it is reasonably to be expected that the owner or occupant of an automobile may place items of personalty. The

> intrusion, although serous, is justified by the need to protect the property of the owner, and to protect the police from claims.

United States v. Edwards, 577 F.2d 883, 895 (5th Cir.), *cert. denied*, 439 U.S. 968 (1978).

Not only is the holding in *Edwards* consistent with the reasoning of *Opperman*, it is also consistent with general notions of fourth amendment jurisprudence outside the context of inventory searches. Regardless of the basis for allowing a search, whether it be an inventory search or a search pursuant to a warrant, the acceptable scope of the search is the same: it is limited to those places where it might be reasonable to believe the items sought will be found. For instance, in *United States v. Ross*, 456 U.S. 798 (1982), this Court deemed a warrantless search permissible because it was based on probable cause. Regarding the scope of that search, the Court observed that "[A] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found...." Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, and drawers. *Id.* In the context of an auto search, there is no distinction between a glove compartment and a trunk; if the items sought might be found therin, it is permissible to search the area. *See Cady v. Dombrowski*, 413 U.S. 433, 447-448 (1973) (upholding caretaking inventory of trunk based on need to protect public safety where officer had reason to believe weapon would be found therein).

Penny's reliance on *Colorado v. Bertine*, 479 U.S. 367 (1987), and *Florida v. Wells*, __U.S.__, 110 S.Ct. 1632 (1990), is misplaced. Both of those cases dealt with the question when an inventory search of an automobile may include a search of those containers found within the vehicle. In both cases, the Court held that such containers could be opened lawfully only if done pursuant to an inven-

tory policy that requires opening of containers. *Colorado v. Bertine,* 479 U.S. at 376; *Florida v. Wells*, __U.S. at __, 110 S.Ct. at 1635. Penny is correct in observing that the record does not reflect that Allen has a policy regarding whether to inventory the contents of containers. However, on the facts of this case, that is not an issue. In the present case, Penny's gun was found lying in the trunk of the car; it was not hidden in any sort of container. Thus, the requirement of a policy governing the opening of containers is unnecessary.

The policy of the Allen Police Department is adequate to insure that inventory searches are not conducted simply in order to uncover evidence of crime. Moreover, there has been no suggestion in this case that any such malfeasance occurred. Rather, the policy effectively serves the important interests recognized by this Court since *Opperman*: it protects the owner's property, it protects the police from potential danger and it protects the police from lawsuits over lost or stolen property. For these reasons, the court below was correct in determining that the inventory search of Penny's car did not violate his fourth amendment rights.

That court applied the correct constitutional standard, and Penny's claim involves only the application of this standard to his particular fact situation. This Court sits to decide important, novel or recurring questions implicating constitutional guarantees, not to review factual or evidentiary determinations based upon settled principles of law. Therefore, Penny's claim does not justify this Court's exercise of its certiorari jurisdiction. *E.g. Tacon v. Arizona,* 410 U.S. 351, 352 (1983).

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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